RAJINDER SINGH S/O BALWANG SINGH

v.

KOAY TEONG CHOOI

HIGH COURT MALAYA, PENANG
DATO' K.C. VOHRAH J.
[SUIT NO. 23-35-89]
31 MAY 1994

TORT: Road accident - Personal injury - Liability - Plaintiff's version of accident corroborated by two independent witnesses - Whether defendant wholly liable for accident - Whether plaintiff contributorily liable - Quantum of damages - General damages - Amalgamation of damges for injuries suffered and pain and suffering and loss of amenities - Special damages - Loss of earnings.

The plaintiff, rider of a motorcycle, was collided into by the defendant's car. The plaintiff alleged that the defendant overtook a motorcycle, encroached on his side of the road and knocked him down. The defendant stated that he was on his correct side of the road when the motorcycle of the plaintiff came over to his side of the road and knocked into his car. The plaintiff's version of the accident was corroborated by two independent eyewitnesses.

The plaintiff suffered injuries as a result of the accident and claimed damages.

Held:

[1] The plaintiff's story was more probable than that of the defendant. However, inspite of the fact that near or at the point of the accident the road was narrower, the plaintiff was riding his motorcycle 3 to 4 feet from his left side of the road. As the plaintiff had admitted that he knew that cars and buses were parked alongside the pavement on the other side of the road, he should have anticipated oncoming vehicles going over to his side of the road either to pass these vehicles or to overtake a moving vehicle passing these parked vehicles. In the circumstances the plaintiff should have ridden his motorcycle nearer to the left side of the road and by failing to do so he was partly responsible for the accident, to the extent of 25%.

[2] Based upon 100% liability, the plaintiff is entitled to an amalgamated sum of RM106,500 as general damages for injuries suffered, pain and suffering and loss of amenities. The plaintiff was also awarded special damages amounting to RM66,517 based upon 100% liability.

[3] For loss of earnings, the plaintiff was awarded a sum of:

(a) pre-trial loss for 60 months at RM650 p.m.	RM40,000
(b) post-trial loss at RM650 p.m. for 4 months while undergoing surgery & recuperation	RM 3,900
(c) post-trial loss at RM350 p.m. for 128 months	RM44,200

based upon 100% liability.

[Judgment for the plaintiff with costs and interest].

Case referred to:

Teoh Suan Eng & Low Meng Shin & Anor. [1982] 2 MLJ 289 ***(refd)***

For the plaintiff - Teja Singh Penesar; M/s. Teja Singh Penesar & Co.

For the defendant - Dr. Jagjit Singh Sidhu; M/s. Lim Kean Siew & Co.

JUDGMENT

K.C. Vohrah J:

The plaintiff's story was that the car which the defendant was driving came very fast from the direction of Air Hitam, Penang. It overtook a motorcycle, passing some parked vehicles, and went over to the other side of the road where the plaintiff on his motorcycle was proceeding at about 20 to 30 kph in the opposite direction. The plaintiff was on the same side of the road where the building of the Pihak Berkuasa Air (PBA) was. The plaintiff said he tried to go to his left but the car then knocked into the his motorcycle and he was thrown off and landed in front of the gate of the PBA building.

The defendant denied that he overtook a motorcycle. He maintained that he was on his correct side of the road when the motorcycle of the plaintiff, travelling very fast downhill, came over to his side of the road and knocked into his car.

No sketch plan of the accident scene was produced. No police officer gave evidence relating to the accident scene or the nature of the damage to the vehicles. However, two persons who claimed they saw the accident testified in the case.

What was common ground in all the evidence of the plaintiff and the defendant and these two witnesses was that the side of the road along which the defendant was travelling from Air Hitam i.e., the side where there were 4 storey flats at the accident scene, had cars and buses parked alongside its pavement. The average width of the road was probably about 20 feet though it was narrower just near where the PBA building was.

I have no reason to disbelieve the two eyewitnesses Murali (PW3), a junior enforcement officer in City Hall, and Mohd Salleh (PW4), a soldier, when they claimed they were strangers to the plaintiff before the accident. I found them to be independent witnesses and I found them reliable. Their evidence of the accident was substantially similar to that of the plaintiff - that the car of the defendant, travelling very fast along the road which had buses and cars parked on its left side of the road, overtook a motorcycle going in the same direction, crossed over to the other side of the road and knocked into the motorcycle of the plaintiff.

I find the plaintiff's story more probable than that of the defendant's. But what has to be borne in mind is that near and or at the point of accident, the area in the vicinity of the PBA building, the road was narrower and yet the plaintiff who had just passed a left turn bend was riding 3 to 4 feet from his left side of the road. On his own admission he knew that on the opposite side of the road near the 4 storey flats cars and buses were parked alongside the pavement; he should have anticipated oncoming vehicles going over to his side of the road either to pass these vehicles or to overtake a moving vehicle passing these parked vehicles: he should have ridden his motorcycle nearer to the left side of the road. In my view he was partly responsible for the accident, to the extent of 25%.

General Damages

The plaintiff suffered injuries as a result of the accident, mostly to the right extremities. He had fractures and his right leg was amputated 15 cm below the knee joint. He suffers from incontinence and impotence which can be corrected by surgery. He uses a pair of crutches. Below is a table of the nature of each of the injuries or disabilities and the proposed award amounts both Counsel think the Court should make -

	Award in RM	
	Plaintiff's Estimate	Defendant's Estimate
1. Cerebral concussion	2,000	1,500
2. Multiple laceration	1,500	750
3. Scars on right thigh and scar above amputation point and scars on right forearm	10,000	2,000
4. Below knee amputation (not able to straighten knee and constitutes considerable disability even with artificial limb)	60,000	35,000
5. Fracture of shaft of right femur (not united; bones internally fixed with nail; will require surgical procedure)	10,000	7,000
6. Fracture of right radius and ulna (plate and screws present)	15,000	8,000
7. Diastasis (i.e. separation of bones without fracture) of right sacro iliac joint (permanent pain)	5,000	-
8. (a) Urinary incontinence (can be corrected by surgery)		7,000
(b) Impotence and infertility (can be corrected by surgery)	80,000	20,000
(c) Diastasis of symphysis pubic		6,500
9. Osteoarthritis, possibility of development in the following joints		
(a) Right knee		
(b) Right hip joint	8,000	Nil
(c) Right sacro-iliac joint (connected with diastasis of right sacro iliac joint)		
10. "Phantom" limb syndrome (post amputation with permanent distressful symptoms)	10,000	Nil

The plaintiff has also claimed RM20,000 for loss of amenities. Counsel for defendant gives no reason why he opposes an award under this head. The plaintiff used to play hockey and football. In fact he played hockey for the State of Penang. He is also less able to socialise. It is quite clear that he is not able to have a meaningful sexual life with his wife because of his impotence. As was opined by V.C. George J. in *Teoh Suan Eng & Low Meng Shin and Anor.* [1982] 2 MLJ 289 at p. 291:

> In a case like the present the plaintiff's real loss is not so much his physical injury as the loss of these opportunities to lead a full and normal life which are now denied to him by his physical condition and for what he will suffer from being unable to do so. There are two elements involved, what he has lost and what he must feel about it and of the two the latter is generally the more important to the injured man. For everyday of his life he is acutely conscious of what he has suffered and what he has lost. He must therefore be compensated, as far as money can do it, for that for the mental strain and anxiety which results.

It is normal for the Court to amalgamate injuries suffered on the one hand and pain suffering on the other in one award and the trend is to include in that one award also loss of amenities. And I propose to do that.

In itemising the injuries and disabilities in the table I have endeavoured to show the extent of the injuries and disabilities and the nature of the awards sought by either side against each injury or disability. The table shows that many of the injuries occurred to the same extremities and that they overlap. While Counsel for the defendant has ignored an award for item 9 there is evidence (see the evidence of Dr. Shanmugam) to support what is claimed for, though the disability shown in item 9 may be considered as a likely disease which will give rise to pain and suffering. I would also consider that items 7 and 8(c) which overlap should be considered under the pain and suffering heading. As for the "Phantom" limb syndrome listed under item 10 again this should be included as part of pain and suffering.

In my view the bulk of the award I should make should fall under item 4 (below knee amputation) and item 8 (urinary incontinence and impotence) and this portion of the award should be RM85,000 and I would round up the other injuries, the pain and suffering and the loss of amenities to RM21,500 making allowance for overlapping. All these come to RM106,500.

Special Damages

As for special damages I award RM66,517 as itemised below.

	RM
1. Surgery for non-union of right-femur (removal of nail and plating and bone graftings -evidence of Dr. Shunmugam)	8,500
2. Surgery for treatment of stump (evidence of Dr. Shanmugam that surgery can be done together with surgery in item 1)	2,000
3. Contractures at right knee (no evidence that surgery is required)	-
4. Cost of prosthesis for impotence (evidence of Dr. Ng Tat Low)	9,800
5. Cost of sphincter for bladder incontinence (report of Dr. Ng Tat Low)	8,900
6. Cost of surgery and hospitalisation for disabilities in items 4 & 5 (evidence and report of Dr. Ng Tat Low)	7,000
7. Present and future costs of artificial limbs and incidental costs (agreed)	22,000
8. Medical bills -	
(i) Penang General Hospital	47
(ii) Lam Wah Ee Hospital	7,930
(iii) Adventist Hospital	340
Total	66,517

Loss of Earnings

The plaintiff was a bus driver before the accident. He was paid on a per trip basis and I am satisfied from the evidence adduced that his average monthly earning was about RM900. After discharge he did look for a job and he did register himself with the Welfare Department for a job for disabled persons but he was unable to get it. In any event, given the fact that, according to medical evidence, he smelt of urine because of his incontinence, I very much doubt it that he could have had a job. I would however deduct living expenses of RM150 from that amount for the pre-trial period.

I expect the plaintiff, who is a young man, will find a job, bearing in mind that in our bouyant

economy these days there are many jobs available. I would think he should be paid at least RM300 p.m. But in calculating the earnings for this post-trial period I think I would have to take into account that he will be unable to work for probably 4 months since he would have to undergo several surgeries and he would need time to recuperate.

I would allow the loss of earnings at RM88,100 as shown below -

1.	Pre-trial loss for 60 months (6 May 1989 to 31 May 1994) at RM650 p.m.	RM40,000
2.	Post-trial loss at RM650 p.m. for 4 months while undergoing surgery and recuperation	RM 3,900
3.	Post-trial loss at RM350 p.m. for 16 years less 64 months i.e. 128 months	RM44,200
	Total	RM88,100

The total amount of damages awarded on a 100% liability comes to RM261,117. The plaintiff is awarded 75% of the amount with costs. Interest on the special damages will be at 4% p.a. from date of accident to date of judgment; on general damages at 8% from service of writ (25 October 1989) till date of judgment; and on the judgment at 8% from date of judgment to date of satisfaction.

RE: HONG KIM SIME; *EX PARTE*: MALAYAN BANKING BERHAD

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[BANKRUPTCY PETITION NO. 140 OF 1993]
11 JULY 1994

BANKRUPTCY: Creditor's petition opposed - Technical objections - Allegation that affidavit verifying petition defective - Affidavit attested by Justice of the Peace contrary to s. 128 of the Bankruptcy Act 1967 - Whether a Justice of the Peace is legally competent to attest affidavit - Bankruptcy notice and creditor's petition bearing different execution numbers - By r. 9(3) of the Bankruptcy Rules 1969 all proceedings of same matter to bear the same number - Whether any breach of statutory requirement - Consideration of Rule 30 Schedule C of the Bankruptcy Act 1967 - Section 4(1) of the Justices of the Peace Ordinance 1961 - Regulation 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 - Section 11 of the Courts of Judicature Act 1964 - Sections 99(1) & (2) of the Subordinate Courts Act 1948.

STATUTORY INTERPRETATION: Bankruptcy Act 1967, s. 128 - Whether a Justice of the Peace is legally competent to attest affidavit verifying creditor's petition - Whether a Justice of the Peace can be considered a "Magistrate" authorised to administer oaths within the meaning of s. 128(a).

WORDS & PHRASES: Interpretation Act 1948 and 1967 - "Magistrate".

The judgment debtor opposed the petition in the present case and two other petitions No. T-29-148-93 and No. T-29-149-93 on the ground that the affidavit verifying petition was irregular, defective and *ex facie void ab initio* thereby rendering the creditor's petition a nullity as the affidavit was attested to by a Justice of the Peace (JP) who, the judgment debtor contended, was not a person authorised to administer oaths in the High Court nor a Magistrate as required by s. 128 of the Bankruptcy Act 1967 (the Act). The judgment debtor also objected to the petition on the basis that the bankruptcy notice and the creditor's petition bore different execution numbers contrary to r. 9(3) of the Bankruptcy Rules 1969 which provides for all proceedings of the same matter to bear the same number.

Held:

[1] An affidavit sworn in Malaysia or Singapore must be affirmed or sworn before a person